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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. HODSON BROADCASTING; RICHARD DEAN HODSON, sole proprietor of Hodson Broadcasting, Defendants - Appellants.	No. 14-17023 D.C. No. 2:11-cv-332-APG-GWF MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Submitted October 18, 2016[**]
San Francisco, California

Before: TASHIMA and M. SMITH, Circuit Judges, and KORMAN,[***] District Judge.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for the Eastern District of New York, sitting by designation.

Richard Hodson, a sole proprietor doing business as Hodson Broadcasting, operated a radio station without authority, in violation of 47 U.S.C. § 301. The Federal Communications Commission imposed a $20,000 forfeiture and referred the matter to the U.S. Attorney, who sued in district court to recover the money. Hodson appeals from a grant of summary judgment for the United States, challenging both liability and the amount of the forfeiture, as well as the denial of leave to file an amended counterclaim. We review de novo the FCC's determination that Hodson is liable. 47 U.S.C. § 504(a). Because Hodson has appeared *pro se* throughout this litigation, we construe his arguments liberally, *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010), but he must still "comply strictly with the summary judgment rules," *id.* (citing *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007)).

We observe at the threshold that the notices of apparent liability, the forfeiture order, and the U.S. Attorney's complaint neglected to cite 47 U.S.C. § 301 as the basis for forfeiture. Instead, they cited 47 C.F.R. § 73.1620, which does not create any enforceable duty. The erroneous citation was not raised below, nor is it raised on appeal. Moreover, this action was prosecuted as a case of unauthorized transmission. Since the issue was tried by the parties' implied consent, the failure to cite § 301 in the complaint may be excused under Fed. R. Civ. P. 15(b)(2). And although the Communications Act requires that each notice of apparent liability identify the legal

command the defendant violated, 47 U.S.C. § 503(b)(4), "technical flaws in a notice can be cured if the actual conduct of the administrative proceedings provides notice to the participants of that which is under consideration," *Nat'l Steel & Shipbuilding Co. v. Director, O.W.C.P.*, 616 F.2d 420, 421 (9th Cir. 1980) (per curiam).

1. Title 47 U.S.C. § 301 bans all transmission of "energy or communications or signals by radio" unless authorized under the Communications Act. Section 503 of the same title authorizes monetary forfeitures for "willful[] or repeated[]" violations of § 301, which the FCC may impose after following certain procedures. *See* 47 U.S.C. § 503(b)(1)(B), (b)(4). The U.S. Attorney has produced substantial evidence that, for more than a year, Hodson willfully and repeatedly transmitted radio signals from a different location and at different technical parameters than those specified in his construction permit. Even taking his submissions in the most generous light, Hodson has not shown a genuine issue of material fact for trial. None of his submissions contradict any of the facts material to a § 301 violation.

Hodson's other challenges to summary judgment are similarly meritless. Hodson had no authority to transmit as he did. Because his construction permit contained a special condition requiring FCC approval before program testing—which was never granted—Hodson's transmissions could not have been valid under 47

C.F.R. § 73.1620. And because he transmitted at variance from the terms of his permit, he could not have been conducting a valid equipment test, which only allows transmission to assure compliance with those terms. 47 C.F.R. § 73.1610.

Nor was summary judgment improper in these circumstances because the Communications Act requires a "trial de novo." *See* 47 U.S.C. § 504(a). We have held as much with respect to an identical requirement in another statute, *Mahroom v. Hook*, 563 F.2d 1369, 1376–77 (9th Cir. 1977) (respecting 42 U.S.C. § 2000e-16), as has every circuit to consider the same question in other contexts, *see, e.g.*, *Freedman v. U.S. Dep't of Agric.*, 926 F.2d 252, 261 (3d Cir. 1991) (respecting 7 U.S.C. § 2023).

Neither has Hodson made out a due process violation. The internal FCC exhibits he did not have access to could not have been a basis for summary judgment because the U.S. Attorney never provided them to the district judge, and Hodson—who now has access to the exhibits—has not identified any material that could have precluded summary judgment if he had offered it. The denial of discovery in a civil case does not require reversal unless there is "actual and substantial prejudice." *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (citations and internal quotation marks omitted). And of course, the district judge "was within its

discretion to dispense with oral argument" on summary judgment. *Carpinteria Valley Farms, Ltd. v. Cty. of Santa Barbara*, 344 F.3d 822, 832 n.6 (9th Cir. 2003).

2. Hodson also challenges the amount of the forfeiture. The determination of the amount of a forfeiture is committed to the discretion of the FCC. *See* 47 U.S.C. § 503(b)(2)(E). Review of a forfeiture amount is limited to whether it reflects a reasonable application of the statute and the "adjustment criteria" set out in § 1.80(II) of the FCC's rules. *See Grid Radio v. FCC*, 278 F.3d 1314, 1322–23 (D.C. Cir. 2002). Here, the base forfeiture amount for each of Hodson's two instances of "[c]onstruction and/or operation without an instrument of authorization for the service" is $10,000. The FCC noted some material supporting Hodson's claimed inability to pay—the only downward criteria he argued—but also found that any consequent reduction was offset by multiple upward adjustments for intentional and repeated violations. The FCC's decision not to adjust downward was reasonable and not an abuse of discretion.

3. Denying leave to amend a complaint is proper when amendment would be futile. *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015). Hodson's Amended Counter-Complaint proposed two claims for damages under the Federal Tort Claims Act. The district court properly found that both were futile. The FTCA does not create a right of action, it only waives the United States' sovereign immunity

for conduct actionable under state tort law. *See Jachetta v. United States*, 653 F.3d 898, 904 (9th Cir. 2011). Hodson does not assert any state-law claim, and what he does assert—essentially that the FCC failed to carry out its administrative duties under federal law—is "not actionable under the FTCA because any liability would arise under federal rather than state law." *Id.*

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

	v.		9th Cir. No.	

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk